91-238

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Ernest E. Riggs, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael T. Braswell
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(405) 232-1950

QUESTIONS PRESENTED

1. Whether the jury's decision as to both damages and liability, regarding Petitioner's 42 U.S.C. 1981 cause of action may be considered final and appealable, although Petitioner has a 42 U.S.C. 2000e causes of action in the same case, which had not been fully decided.

2. Whether the trial court's sua sponte order for a new trial regarding Petitioner's 1981 cause of action was timely entered and proper under the Federal Rules of Civil Procedure.

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

Ernest E. Riggs, Petitioner

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Tenth Circuit court of appeals (Pet. App A) and the Order of the District Court (Pet App. B) are not published.

JURISDICTIONAL STATEMENT

Petitioner comes before this Court on Writ of Certiorari (postmarked on June 11, 1991) pursuant to Rule 10 (a) of the Rules of the Supreme Court, seeking

review of the Tenth Circuit Court's decision entered on March 13, 1991, upholding the trial court's granting of a new trial on February 7, 1989, on Petitioner's 1981 cause of action. Petitioner maintains that the trial court's sua sponte ruling was untimely entered and substantially departs from the accepted and usual course of judicial proceedings, and that the Tenth Circuit Court's ruling improperly sanctioned the lower trial court's departure. The jurisdiction of this Court is granted by 28 U.S.C. 1254(1)

RELEVANT STATUTES AND RULES

42 U.S.C. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full

and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2000e-2 (a)(1)

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Rule 59(d) of the Federal Rules of Civil Procedure

Not later than 10 days after entry of

judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

STATEMENT OF CASE

Petitioner commenced this action in November 1987 pursuant to 42 U.S.C. Section 1981 and Title VII, 42 U.S.C. Section 2000e, alleging Respondent wrongfully terminated Petitioner's employment on the basis of his race, white (Caucasian).

Following a jury trial on Petitioner's 1981 claim, the jury, on June 2, 1988, returned a verdict in favor of Petitioner

on said claim. Also on June 2, the trial court, addressing the Title VII claim, made an initial determination in favor of Respondent.

On June 10, Respondent filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial, challenging the jury verdict on the Section 1981 claim. The district court denied that motion on September 1, 1988, and also reversed its initial determination in Respondent's favor on the Title VII claim, and held in favor of Petitioner because it was bound by the jury's 1981 determination regarding liability, the ultimate question of discrimination. The trial court then set a hearing on the issue of Title VII relief. On September 21, 1988, a hearing was held to determine attorney fees, and on October 4, 1988, it was ordered that

Petitioner was entitled to reasonable attorney fees.

Respondent filed a notice of appeal on September 27, 1988, challenging the district court's September 1, 1988, denial of its motion for new trial or judgment JNOV. On December 7, 1988, Respondent further filed a motion for reconsideration of the denial of its motion for new trial, asserting for the first time that the jury verdict on the Section 1981 claim was the result of a jury compromise. On February 7, 1989, the district court denied the motion to reconsider, but sua sponte ordered a new trial, after concluding the jury verdict was the result of a compromise.

The district court conducted a second jury trial, which resulted in a verdict in favor of Respondent on the Section 1981 claim. The trial court then held in

Respondent's favor on the Title VII claim and awarded Respondent costs.

Petitioner appealed to the Tenth Circuit Court of Appeals; and the Tenth Circuit Court affirmed the decision of the trial court. Petitioner submits this writ of certiorari seeking a ruling from this Court reversing the decision of the 10th Circuit Court and holding that the trial court improperly ordered a new trial on Petitioner's 1981 claim as its sua sponte order granting a new trial was not timely entered. Moreover, Respondent's filing of Notice of Appeal divested the trial court of any jurisdiction it might have had to grant a new trial.

ARGUMENTS

I.

THE JURY'S DECISION ON THE PETITIONER'S 1981 CAUSE OF ACTION AND THE TRIAL COURT'S SUBSEQUENT DENIAL OF A RESPONDENT'S MOTION FOR JUDGMENT JNOV WAS A FINAL AND APPEALABLE DECISION

Petitioner's case contained two separate and distinct causes of action; one under Title VII 42 U.S.C. 2000e and the other under 42 U.S.C. 1981. A jury trial was had on Petitioner's 1981 cause of action, and a verdict was given in Petitioner's favor. Respondent then filed a motion for a new trial or in the alternative judgment JNOV which was denied. At that point the decision regarding Petitioner's 1981 cause of action became final and appealable.

Since 1856, this Court has stated that a decision is final when it disposes of the whole subject, gives all the relief contemplated and leaves nothing to be done. Beebe v. Russell, 60 U.S. 283, 285, 50 LEd 668 (1856) That is exactly what happened with regard to Petitioner's 1981 claim. A jury trial was conducted; liability was determined; damages were awarded and there was nothing remaining to be done regarding Petitioner's cause of action under 42 U.S.C. 1981. The jury decision regarding the same was, therefore, final and appealable.

Oklahoma law states that when several cognate matters are litigated in the framework of one case, there may be several successive final and appealable orders, although the law contemplates but one judgment that disposes of the main action. Ray E. Stubblefield v. General

Motors Acceptance Corporation, 619 P.2d 620, 624 ((Okl. 1980) citing State ex rel Board of Affairs v Neff, 205 Okl. 205, 236 P.2d 681, 683 (1951)). Other states have also held that where there are multiple claims in a single law suit, the disposition of one or more but fewer than all of those claims can be considered final and appealable. Daniels v. McKay Machine Co., 607 F.2d 771, 773 (CA Ill 1979).

The point here is that where an independent cause of action has been completely decided, the decision therein should be considered final and appealable. The fact that there may be additional causes of action contained in the same suit should have no bearing on the appealability of the particular cause of action that has been decided. Certainly, there would be no question of

the finality and appealability of Petitioner's 1981 action if it were not accompanied by Petitioner's second cause of action under 42 U.S.C. 2000e. The term "final decision" does not necessarily mean the last order possible to be made in a case. Eisen v. Carlisle and Jacqueline, 370 F.2d 119, 120 (2nd Cir. 1966). The most important considerations are the inconvenience and costs of piecemeal review on one hand and denying justice by delay on the other hand. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-153, 85 Sct. 308, 13 LEd.2d 199 (1964).

That Petitioner's 1981 cause of action was decided in a separate jury trial shows clearly that it was considered and treated as a separate and independent cause of action. All matters were concluded concerning said cause of action

and any decision rendered in Petitioner's Title VII claim can have no effect on what was already decided by the jury concerning Petitioner's 1981 claim.

II.

THE TRIAL COURT'S GRANTING OF A NEW TRIAL SUA SPONTE WAS NOT TIMELY ACCORDING TO RULE 59 (d) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The trial court ordered a new trial concerning Petitioner's 1981 cause of action because it concluded the jury verdict was a compromise verdict. It is not clear what made the trial court come to this conclusion, but in any event, it had ten (10) days after said verdict became final to order a new trial on its own initiative. Rule 59 (d) states:

> Not later than 10 days after

> entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor. (Emphasis added).

The jury's verdict became final when the trial court first denied Respondent's Motion for Judgment JNOV. The trial court ordered a new trial in the instant case more than five (5) months after it denied Respondent's motion. Moreover Respondent's Motion to reconsider the denial of its Motion JNOV was completely out of time and inappropriate. If this court accepts the proposition that the jury verdict regarding Petitioner's 1981 claim was both final and appealable, it must also conclude that the trial court's

order for a new trial regarding the same was not timely.

The lower court, stated that no judgment had been entered and therefore the ten (10) day time limit set by Rule 59(d) was never triggered. The mere fact that the trial court failed to enter the judgment is inconsequential. The record shows that no objection was made to this failure and the parties treated the jury's verdict as a final judgment. Respondent filed a notice of appeal regarding said verdict and the court ruled that Petitioner was entitled to reasonable attorney fees. The technical requirement that a separate document be filed is, therefore, waived. Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1372 N.1 (11th Cir. 1983).

The requirements of finality should be given a practical rather than a technical

construction Fox v. City of West Palm Beach, 383 F.2d 189, 193 (5th Cir. 1967) For all practical purposes, the judgment rendered regarding Petitioner's 1981 claim was both final and appealable.

III.

NOTWITHSTANDING THE FACT THAT THE TRIAL COURT ENTERED ITS SUA SPONTE ORDER FOR NEW TRIAL OUT OF TIME, RESPONDENT'S PRIOR FILING OF ITS NOTICE OF APPEAL DIVESTED THE COURT OF JURISDICTION

It is well settled law that the filing of a timely notice of appeal divest the district court of jurisdiction, e..g., Garcia v. Burlington Northern R.R. Co., 818 F.2d 713, 712 (10th Cir. 1987) Respondent filed its notice of appeal regarding the trial court's denial of its Motion for judgment JNOV on September 27, 1988 over four months before the Court,

sua sponte, ordered a new trial. The record is clear that, beginning September 27, 1988, the trial court had no jurisdiction to order a new trial or do anything else regarding the jury verdict in Petitioner's favor. Therefore, any action taken by the trial court past that point is null and void.

IV.

THE TRIAL COURT'S DECISION IN RESPONDENT'S FAVOR REGARDING PETITIONER'S TITLE VII 42 U.S.C. 2000e CLAIM SHOULD BE REVERSED BECAUSE IT DOES NOT COMPLY WITH THE ORIGINAL JURY VERDICT REGARDING PETITIONER'S 1981 CLAIM

If this court should find that the initial jury determination in Petitioner's favor should be upheld, then it must also find that liability under 42

U.S.C. 2000e must be held in Petitioner favor. This is true because the question of discrimination would already be decided by the 1981 verdict. The only question left for determination would be damages under 42 U.S.C. 2000e.

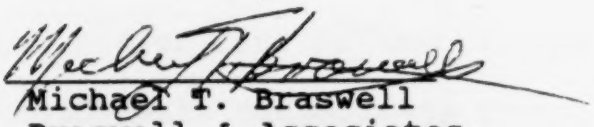
CONCLUSION

The jury decision regarding Petitioner's 1981 claim was final in every respect. The trial court and Respondent treated it as such. The trial court's order for a new trial, more than five (5) months after its denial of Respondent's Motion for Judgment JNOV, was completely untimely and improper. In any event, the Respondent's filing of its notice of appeal divested the trial court of any jurisdiction to order a new trial.

Wherefore, Petitioner prays that this Court reverse the Tenth Circuit Court's opinion, and reinstate the district

court's judgments entered on September 1, 1988 Petitioner further prays that this court remand the instant case back to the trial court for the purpose of determining damages under 42 U.S.C. 2000e.

Respectfully submitted.



Michael T. Braswell
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 1991, three (3) correct copies of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to the following:

Peter Van T. Dyke
1200 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102
(405) 235-7471

Michael T. Braswell

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AFFIDAVIT OF MAILING

This Petitioner's Appendix was mailed, first class, postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States, on August 7th, 1991, from the Main Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73102.

Michael R. Braswell
3621 N. Kelley, Suite 100
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405/232-1950

STATE OF OKLAHOMA,)
) SS.
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 7th day of August, 1991.

Barbara Braswell
Notary Public

My Commission Expires 10-19-93.

91-238

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

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Appendix A
Filed 5/13/91

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ERNEST E. RIGGS,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Nos. 89-6297
	)	&
SCRIVNER, INC., an	)	89-6350
Oklahoma corporation,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-90-2301-W)

Submitted on the briefs:

Michael T. Braswell, Oklahoma City, Oklahoma
for Plaintiff/Appellant.

David M. Curtis of Lytle Soule & Curlee, Oklahoma City, Oklahoma, for Defendant/Appellee.

Before ANDERSON, TACHA, and BRORBY, Circuit Judge

ANDERSON, Circuit Judge.

Plaintiff appeals from several adverse district court rulings made in this civil action, commenced pursuant to 42 U.S.C. Section 1981 and Title VII, 42 U.S.C. Section 2000e, alleging Defendant wrongfully terminated Plaintiff's employment on the basis of his race, white. In appeal No. 89-6297, Plaintiff asserts ten grounds of error in the trial court proceedings, which ultimately resulted in verdicts in favor of Defendant on both claims. In appeal No. 89-6350, Plaintiff challenges the trial

court's award of costs to Defendant[1].

Plaintiff commenced this action in November 1987, seeking reinstatement, back pay, and actual and punitive damages. Following a trial on the merits, the jury, on June 2, 1988, returned a verdict in favor of Plaintiff on the Section 1981 claim. Also on June 2, the trial court, addressing the Title VII claim, made an initial determination in favor of Defendant.

On June 10, Defendant filed a Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial, challenging the jury's verdict on the

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[1] After examining the briefs and appellate record, this panel has determined unanmiously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34 1.9. The cases are therefore ordered submitted without oral argument.

Section 1981 claim. The district court denied that Motion on September 1. Also on September 1, the district court, ruling it was bound by the jury's determination on the issue of discrimination, reversed its initial determination on the Title VII claim, held in favor of Plaintiff and set a hearing on the issue of Title VII relief. The district court held that hearing on September 9, but did not rule on the issue of Title VII relief.

Defendant filed a notice of appeal on September 27, 1988, challenging the district court's September 1 determinations. On December 7, Defendant filed a Motion for Reconsideration of the denial of its Motion for New Trial, asserting for the first time that the jury's verdict on the Section 1981 claim was the result of a jury compromise. The

district court denied the Motion to Reconsider, but sua sponte ordered a new trial, determining the jury verdict was the result of a compromise.

The district court conducted a second jury trial, which resulted in a verdict in favor of Defendant on the Section 1981 claim. The trial court then held in Defendant's favor on the Title VII claim and awarded Defendant costs.

The issue presented by Plaintiff's first ground for error in appeal No. 89-6297 is whether the district court's referral of this action to mandatory, nonbinding arbitration, pursuant to Western District of Oklahoma Local Rule 43, violated Plaintiff's constitutional right to a jury trial on his Section 1981 claim. See generally Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988) (where Title VII and

Section 1981 claims combined in one action, seventh amendment entitles Plaintiff to jury trial on Section 1981 but not on Title VII claim).

Local Rule 43(P)(1) provides, at the request of a party, for a trial de novo before the district court following arbitration. Further, Rule 43(P)(2) provides, that "unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence" during the trial de novo.

The record indicates that, following the arbitration proceedings, the district court conducted a de novo jury trial on Plaintiff's Section 1981 claim. Referral of this action to arbitration, therefore, did not deny Plaintiff his right to a jury trial. See New England Merchant's Nat'l Bank v. Hughes, 556 F. Supp. 712,

714 (E.D. Pa. 1983) (local compulsory arbitration rule, similar to Local Rule 43, "does not in any way abridge the constitutional right of a litigant to trial by jury since the litigant is entitled to demand a trial de novo provided he has complied with the procedures set forth" in the local rule).

In his second ground for error, Plaintiff asserts the district court erred in considering Defendant's Motion for Reconsideration of the denial of its Motion for a New Trial because Defendant filed the Motion to Reconsider beyond the ten-day period provided by Fed. R. Civ. P. 59(b).[2] Similarly, in his third ground for reversal, Plaintiff asserts

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[2] In his appellate brief, Plaintiff also asserts defendant's Motion for Reconsideration was frivolous and requests an award of sanctions against Defendant. Appellant's Brief (No. 89-6297), 7. This request is denied.

that the district court erred in sua sponte granting a new trial beyond the ten-day time frame provided by Rule 59(d).

The ten-day period provided by Rule 59 begins to run only from the entry of a final judgment. Anderson v. Deere & Co., 852 F.2d 1244, 1246 (10th Cir. 1988); see generally Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (final order ends litigation on merits and leaves nothing for court to do but execute judgment). At the time Defendant filed the Motion for Reconsideration and at the time the district court sua sponte ordered a New Trial, there had been no final judgment entered in this action because the issue of Title VII relief had not yet been determined. See Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976) (where issue of liability has

been determined, but assessment of damages or award of other relief remains to be resolved, order determining liability is not final order.

Because a final judgment had not yet been entered in this action to commence Rule 59's ten-day limitations period, the district court's consideration of the Motion for Reconsideration and the district court's order sua sponte granting a New Trial did not violate Rule 59. Further, because a court possesses the discretion to revise its interlocutory orders prior to the entry of a final judgment, Anderson, 852 F.2d at 1246 (citing Fed. R. Civ. P. 54(b), the district court was not procedurally precluded from ordering a New Trial.

The issue presented by Plaintiff's sixth argument on appeal is whether, because Defendant had filed a notice of

appeal prior to its Motion for Reconsideration, the district court lacked jurisdiction to grant a New Trial. While the filing of a timely notice of appeal divests the district court of jurisdiction, e.g, Garcia v. Burlington Northern R.R. Co., 818 F.2d 713, 721 (10th Cir. 1987), a premature notice of appeal is ineffective to transfer jurisdiction from the district court to the Court of Appeals. Art Janpol Volkswagen, Inc. v. Fiat Motors of N. Am., Inc. 767 F.2d 690, 697 (10th Cir. 1985). Because Defendant's notice of appeal was premature, in light of the fact that the issue of Title VII relief has yet to be determined, Defendant's notice of appeal was insufficient to deprive the district court of jurisdiction to grant a New Trial. Id. For these same reasons, Plaintiff's ninth

argument on appeal, that Defendant by filing a notice of appeal but never filing an Appellate Brief, waived any challenge to the jury's verdict in the first trial, also lacks merit.

Plaintiff's fifth argument on appeal challenges the district court's imposition of sanctions against Plaintiff's attorney. Plaintiff's attorney, rather than Plaintiff, was the party aggrieved by the district court's imposition of sanctions and, therefore, was the proper party to appeal from this decision. Federal Trade Comm'n v. Amy Travel Serv., Inc. 875 F.2d 564, 577 (7th Cir.), cert. denied., 110 S. Ct. 366 (1989) (citing Rogers v. National Union Fire Ins. Co. 864 F.2d 557, 559-60 (7th Cir. 1988)). The rules of federal appellate procedure require that the notice of appeal "shall specify the party

or parties taking the appeal." Fed. R. App. P. 3(c); see also Concorde Resources, Inc. v. Woosley (In re Woosley), 855 F.2d 687, 687 (10th Cir. 1988). Failure to name the proper party taking the appeal will result in the dismissal of an appeal for lack of appellate jurisdiction. Torres v. Oakland Scavenger Co., 487 U.S. 312, 314 317 (1988); see also Woosley, 855 F.2d at 688. Because the notice of appeal filed in appeal No. 89-6297 failed to name Plaintiff's attorney as a party to the appeal, this court lacks jurisdiction to review the merits of this argument. See Woosley, 855 F.2d at 687-88; see also Amy Travel Serv. 875 F.2d at 577.

Plaintiff asserts four arguments on appeal challenging the second jury trial. Plaintiff first asserts that, because the issue of Defendant's liability on the

Section 1981 claim had been conclusively resolved by the first jury trial, the only appropriate issue to be addressed during the second trial was the issue of damages. The district court granted a new trial after determining that the verdict in the first trial was the result of a jury compromise.[3] "A compromise judgment is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages." National R.R. Passenger Corp. v. Koch Indus. Inc., 701 F.2d 108, 110 (10th Cir. 1983) (emphasis added). The district court's order granting a new trial on both the issue of liability and the issue of damages was not erroneous in

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[3] Plaintiff does not challenge, on appeal, the merits of the district court's decision to vacate the verdict reached in the first jury trial because the verdict represented a jury compromise.

light of the district court's determination that the jury verdict was the result of a compromise. See id.

Plaintiff next asserts both that the district court erred in denying Plaintiff's Motion for a Directed Verdict and that the jury's verdict in favor of Defendant was not supported by sufficient evidence. This court reviews the denial of a Motion for a Directed Verdict de novo. Guilfoyle ex rel. Wild v. Missouri, Kan. & Tex. R.R. Co., 812 F.2d 1290, 1292 (10th Cir. 1987). A directed verdict is appropriate only if the evidence, viewed in the light most favorable to the nonmoving party, "points but one way and is susceptible to no reasonable inferences supporting" the nonmoving party. Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988). Further, this

court's review of the evidence underlying a jury verdict in a civil case is limited to determining "whether the record contains substantial evidence to support the jury's . . . conclusion, viewing the evidence in the light most favorable to the prevailing party." Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248, 251 (10th Cir. 1987). After careful review of the evidence presented during the second jury trial, we determined that Plaintiff was not entitled to a directed verdict and that substantial evidence supported the jury's verdict in favor of Defendant.

Lastly, Plaintiff asserts the trial judge erred in making statements prejudicial to Plaintiff in the presence of the jury. Review of the record fails to indicate any remark made by the trial court which might have prejudiced

plaintiff's case before the jury.

In appeal No. 89-6350, Plaintiff challenges the district court's award of costs to Defendant. This court reviews an award of costs under an abuse of discretion standard. United States Indus. Inc. v. Touche Ross & Co., 854 F.2d 1223, 1245 (10th Cir. 1988) With one exception, we affirm the district court's award of costs.

Plaintiff challenges the district court's taxation of a witness fee of thirty-five dollars for Defendant's expert witness. The witness fee for an expert witness who is not court-appointed is limited to the thirty dollar per day limit authorized in 28 U.S.C. Section 1821(b). Crawford Fitting Co. v. J.T. Gibbons, Inc. 482 U.S. 437, 441-42 (1987); Furr v. AT&T Technologies, Inc. 824 F.2d 1537, 1550 (10th Cir. 1987). A

federal court does not have jurisdiction to go beyond that statutory limitation. Crawford Fitting, 482 U.S. at 445. The district court, therefore, abused its discretion in awarding Defendant thirty-five dollars a day for two days as a witness fee for Defendant's expert witness.

To the extent appeal No. 89-6297 challenges the district court's imposition of sanctions against plaintiff's attorney, that appeal is DISMISSED for lack of appellate jurisdiction. We remand appeal No. 89-6350 to the district court for the purpose of reducing the total award of costs by ten dollars. See e.g., Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986). In all other respects, the judgments of the United States District Court for the Western

District of Oklahoma are AFFIRMED. Plaintiff's request for sanctions in appeal No. 89-6297 is DENIED.

Appendix B
Filed 2/7/89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CIV-87-2301-R
	)	
SCRIVNER, INC.,	)	
	)	
Appellee.	)	

ORDER

This matter comes before the Court upon Defendant's Motion to Reconsider the Court's denial of its Motion for Judgment Notwithstanding the Verdict and upon Plaintiff's Response and Request for Sanctions.

In this case the plaintiff sued his employer, Defendant Scrivner, Inc.,

alleging that Scrivner terminated his employment because he is white, in violation of 42 U.S.C. Section 1981 and 42 U.S.C. Section 2000(e). Plaintiff's Section 1981 claim was heard by a jury May 31, 1988, and a verdict was rendered in favor of the Plaintiff on June 2, 1988. Consistent with the jury verdict, the Court found in favor of the Plaintiff, on his Title VII claim and held a hearing on the feasibility of reinstatement of Mr. Riggs' employment with the Defendant. The court has not ruled on that matter and judgment has not been entered in this case.

In his Motion to Reconsider, Plaintiff asserts for the first time, that the jury verdict was an obvious compromise, and seeks Judgment NOV on that basis.

The court has determined that the

verdict in favor of the Plaintiff was likely reached as a result of jury compromise.

In his Section 1981 action, the Plaintiff requested compensation in the form of back pay and lost benefits. The issue of back pay was properly before the jury and the jury was instructed as to the issues of back pay and lost employment benefits. The jury found for the Plaintiff and awarded him $6,000.00 in damages.

The damages awarded by the jury bear no relationship to the evidence presented by the plaintiff at trial. Plaintiff presented evidence to the jury that his current employment pays him $9.00 per hour plus certain employment benefits, and his position with the Defendant paid $14.40 per hour at the time of his termination, plus substantial fringe

benefits which are not available at his present employment. Plaintiff's evidence indicated that he suffered a loss of back pay, including lost fringe benefits of approximately $65,000.00. Plaintiff also sought $150,000.00 in punitive damages. Although the court has a duty to reconcile the jury's verdict on any reasonable theory consistent with the evidence, Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108, 83 S. Ct. 659, 9 L.Ed.2d 618 (1963); Ortiz v. Bank of American National Trust and Savings Ass'n, 852 F.2d 383 (9th Cir. 1988), the court cannot reconcile a compromise judgment.

"A compromise judgment is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages." (citations omitted) National Railroad

Passenger Corp. v. Koch Industries, Inc. 701, F.2d 108, 110 (10th Cir. 1983).

The court must examine several factors to determine whether a verdict is the result of jury compromise.

> In particular, a damage award that is grossly inadequate, a close question of liability, and an odd chronology of jury deliberations are all indicia of a compromise verdict.

Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1445-46 (10th Cir. 1988).

In this case the damage award is grossly inadequate, and bears no rational connection with the facts in evidence.

The question of liability was indeed a close one. The Court initially found in favor of the Defendant on Plaintiff's Title VII claim. That decision was based upon the evidence adduced at trial. Thereafter, the Court determined that its

ruling on Plaintiff's Title VII claim must comport with the jury's determination of Defendant's liability, reconsidered its initial decision and found in favor of the Plaintiff. Order of September 1, 1988.

In this case, the Plaintiff alleged that he was discharged because he is white. Defendant asserted that it terminated Plaintiff because he had absented himself from work without clocking out on several occasions. The Plaintiff admitted to the infraction, but asserted that several black employees had committed similar offenses and were subjected to discipline short of termination by the Company. According to the Plaintiff he would not have been discharged if he were not white, and the reason given for discharging him was pretextual. The question of pretext was

a close one, and evidence was presented by each side in support of its position.

Additionally, the pattern of jury deliberation lends itself to the conclusion that the verdict was a compromise. The jury retired at 2:20 p.m. June 1, 1988. At approximately 5:00 p.m., it indicated that it could not reach a verdict and requested to be discharged for the evening. It resumed deliberation the following morning, and thereafter it sent a note to the Judge which asked: "if we find in favor of the Plaintiff can we not award any damages at all?" The court responded and thereafter, at 11:30 a.m., the jury returned its verdict. The question asked by the jury and its sudden decision to award six thousand dollars to the Plaintiff shortly thereafter "raises the question of the reliability of the jury's

verdict." Skinner, supra, at 1446.

Neither party has offered any basis upon which the Court can reconcile the damage award with the evidence of damages presented at trial, nor can the Court find any relationship between the damage award and the evidence. Accordingly the Court finds that the damages awarded in this case appear to be arbitrary, the award bears no relationship to the evidence presented, representing less than ten percent of the damages claimed by the Plaintiff for back pay and fringe benefits. The question of liability in this case was a close one depending upon whether the Defendant's announced reason for terminating the Plaintiff's employment was a mere pretext for racial discrimination or whether is was the actual reason for discharging the Plaintiff. Finally, the jury's pattern

of deliberation , and particularly the jury's question, asking if it could find the Defendant liable and award no damages to the Plaintiff, provides a strong indication that the jury was seeking a compromise on the basic issue of whether the Defendant was liable under Section 1981.

In its Motion to Reconsider, Defendant seeks only reconsideration of the Court's denial of Defendant's Motion for Judgment Notwithstanding the Verdict. The Order of denial was issued September 1, 1988, and Defendant makes reference to no Rule of Civil Procedure under which the Court could reconsider its Order of September 1, 1988.

The Court agrees with the Defendant that the jury verdict appears to have been a compromise verdict; however, the appropriate remedy in this case is for

the Court to order a new trial sua sponte, since judgment has not yet been entered in this case. Fed. R. Civ. P. 59(d).

The court notified the parties of its concern that the jury verdict appeared to have been a compromise verdict, pursuant to Fed. R. Civ. 59(d). A hearing was held and argument was presented by both parties on February 3, 1989. Upon consideration of the record in this case, and the facts and arguments presented, the court agree with the Defendant, that the jury verdict, appears to have been a compromise verdict, and further determines that a new trial should be ordered in this case.

Accordingly, Defendant's Motion to Reconsider is denied, and Plaintiff's Motion for Sanctions is denied. A new trial is ordered in this case to be set

on the April jury docket

IT IS SO ORDERED this 7th day of February, 1989.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

Appendix C
Filed 9/1/88

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS, Plaintiff,	)	
vs.	)	CIV-87-2301R
SCRIVNER, INC., Defendant.	)	

ORDER

This matter comes before the Court upon Defendant, Scrivner, Inc.'s Motion for Judgment Notwithstandin the Verdict or in the Alternative for New Trial.

This is an employment discrimination case in which the Plaintiff, a white man, asserted that his employment was terminated by the Defendant because of his race. On May 31, 1988, this case

came on for trial by jury on Plaintiff's claim under 42 U.S.C. Section 1981, and for trial by the Court pursuant to Plaintiff's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e).

After hearing the evidence, the jury, on June 2, 1988, returned its verdict in favor of the Plaintiff in the amount of $6,000.00. The Court heard the evidence with regard to the Title VII action, and announced its preliminary determination in favor of the Defendant. Since that time the Court has reconsidered its decision and, upon determination that it was bound by the finding of the jury, found for the Plaintiff on his Title VII action.

Defendant, Scrivner, seeks judgment nov pursuant to Fed. R. Civ. P. 50(b) or seeks a new trial pursuant to Fed. R.

Civ. P. 59.

It is Scrivner's position that there was not sufficient evidence to prove that Plaintiff's discharge from his employment was discriminatory, or that such discrimination was intentional.

For Plaintiff to prevail under Section 1981, there must be an affirmative showing of purposeful discrimination. General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982); Clark v. Atchison, Topeka & Santa Fe Railway Co., 731 F.2d 698 (10th Cir. 1980). That showing may be made by evidence which demonstrates Mr. Riggs was treated differently than black employees in similar situations. Montgomery v. Yellow Freight System, Inc., 671 F.2d 412 (10th Cir. 1982).

The parties stipulated that Plaintiff was terminated from his

employment with the Defendant on February 16, 1986 and that the Plaintiff admitted leaving Defendant's facility on two occasions without clocking out.

Defendant produced evidence at trial to show that the reason Mr. Riggs' employment was terminated was because he left work without clocking out and that such conduct subjected the offender to immediate discharge.

Plaintiff produced evidence at trial, by way of testimony and personnel records of other employees of Defendant, that on several occasions black employees committing the same offense or similar offenses were not fired, but were merely counseled or suspended. Plaintiff's evidence, if believed by the jury, could be construted as proving that such disparate treatment was racial in character and a violation of Section

1981.

In determining whether to grant Defendant's Motion for Directed Verdict, the Court must view the evidence most favorably to the Plaintiff, giving him the benefit of all reasonable inferences, and it may not substitute its judgment for that of the jury, Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984).

Applying that standard, the Court finds that there was sufficient evidence for the jury to find in favor of the Plaintiff.

Accordingly, Defendant's Motion for Judgment Notwithstanding the Verdict is hereby DENIED. Likewise, Defendant's Alternate Motion for a New Trial is DENIED.

ENTERED this 1st day of September, 1988.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

Appendix D
Filed 9/27/88

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV-87-2301-R
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

MOTION TO RECONSIDER DEFENDANT'S
MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

Comes now the Defendant, Scrivner, Inc. and moves the Court to reconsider its Motion for Judgment Notwithstanding the verdict for the reasons set forth in the attached brief.

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David M. Curtis
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Attorneys for Defendant

Appendix E
Filed 10/4/88

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS, Plaintiff,	)	
vs.	)	CIV-87-2301R
SCRIVNER, INC., Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Scrivner, Inc., Defendant in the above-styled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final order of the United States District Court for the Western District of Oklahoma, awarding attorney's fees to the Plaintiff, which order was entered on November 9, 1988.

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APPENDIX F
Filed October, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-87-2301-R
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

O R D E R

Plaintiff has moved for an award of attorney's fees pursuant to 42 U.S.C. Section 1988 and 42 U.S.C. Section 2000(e)(5)(k). Defendant responded, objecting both entitlement and the amount of fee sought. The matter was referred to the undersigned Magistrate for hearing, pursuant to 28 U.S.C. Section 636 and Local Rule 39. An evidentiary hearing was held on September 21, 1988,

all parties appearing through counsel, and in consideration of the arguments, evidence, and testimony, the Court rules as follows.

Plaintiff in this case was a white male employee of Defendant who was discharged by Defendant and sued for employment discrimination under both Title VII and 42 U.S.C. Section 1981. This was a "reverse discrimination" case. Despite an adverse decision in arbitration and the granting of summary judgment as to the Title VII claim, plaintiff prevailed by obtaining a $6,000 jury verdict on the Section 1981 claim. The Title VII summary judgment was later vacated, and the appropriate remedy is presently under advisement by Judge Russell. Counsel for plaintiff has submitted an affidavit in which he claims a reasonable attorney's fee in this

matter would be an award compensating him at $150 per hour for 90.1 hours and his legal assistant at $85.00 per hour for 189.9 hours, for a total fee sought of $29,656.50. At the time of hearing, certain corrections were made by plaintiff, revising downward the claim for attorney's time by 4.6 hours and legal assistant's time by 8 hours.

The Court finds that plaintiff, as prevailing party, is entitled to the award of a reasonable attorney's fee. Hensley v. Eckerhart, 461 U.S. 424 (1983); Ramos v. Lamm, 713 F.2d 546 (1983). Ramos sets out in some detail the considerations upon which the relevant factors in support of a reasonable fee are to be assessed and applied to achieve a just result. The first step is to determine the number of hours reasonably spent by counsel. Ramos, 713 F.2d at 553.

Evidence at the hearing on fees revealed that contemporaneous time records were not kept by counsel for plaintiff. Joseph McCormick, legal assistant to plaintiff's counsel, estimated that the number of time slips that had been reconstructed at the conclusion of the case could be one third, but frankly stated he really had no idea. It is obvious from even a cursory review of the time slips, that the majority are the result of reconstruction, rather than contemporaneous recording. Although counsel for plaintiff touts his expertise in the file of civil rights, he appears to be unaware that the Circuit has mandated in 1983, in Ramos, that contemporaneous time records be kept, reflecting not only the hours spent, but the specific tasks performed. While the failure to maintain contemporaneous

records does not automatically defeat plaintiff's claim for fees, it requires that "...(t)he district court should give special scrutiny to any reconstructions or estimates of time expended and make reductions when appropriate." Id., at n.2. Thus, defendant's motion to strike the attorney's fee affidavit for failure to keep contemporaneous time records is denied, but the affidavit will be carefully scrutinized.

In evaluating the number of hours spent in any civil rights case, the Court is required to examine the hours allotted to specific tasks, to determine whether the tasks sought to be charged to the adverse party would normally be billed to a paying client. Ramos, 713 F.2d at 554. In this case, plaintiff's counsel attempts to bill all hours spent by his legal assistant, despite the testimony of

the legal assistant, Joseph McCormick, that he spent a large number of hours educating himself on the law of civil rights cases. Although plaintiff's counsel attempts to justify the award of fees for this time by virtue of his visual impairment and the corresponding need for the aid of a legal assistant, the Court believes that this is one of those tasks that should not and would not ordinarily be billed to a client, and thus may not be sought from opposing parties. Another consideration is the duplication of services, and again the Court finds certain tasks, for which both counsel and his legal assistant billed time, result in multiple compensation which is inappropriate, Id.

Ramos counsels that the next inquiry is the determination of a reasonably hourly rate. Mr. Braswell, counsel for

plaintiff, claims his services are entitled to be compensated at the rate of $150.00 per hour. He offers no evidence in support of that rate as reasonable. Mr. Braswell's argument is that, because counsel for defendant charges $145.00 per hour, he should be compensated in at least an equivalent amount. Counsel offered no evidence as to his normal billing rate; in fact, he apparently has no normal billing rate, as all cases are accepted on either a flat fee or contingent basis. Although counsel, as mentioned, believes himself highly experienced in the area of civil rights law, he admitted that this particular type of case, i.e., reverse discrimination, was new to him. Further, he relied almost exclusively on the preparation and work of a legal assistant, and the testimony at the

hearing was that some of the hours spent were as a result of the file does not support either Mr. Braswell's claim or a finding that his skill and experience justifies an award of $150.00 a hour. The Court finds $100 per hour to be a reasonable rate after compensation for Mr. Braswell.

No evidence was adduced supporting an award of $85.00 per hour for the hours expended by a legal assistant. Again, counsel asserts his need for the work of his legal assistant, being greater than that of a lawyer without visual impairment, justifies payment of that assistant at a higher rate. Counsel offers neither evidence nor case law to support this theory, and the Court finds that, as is the case with attorney time, both the hours spent and rates charged must be scrutinized in accord with the

prevailing practice in the community. Ramos, 713 F.2d at 559. Evidence was submitted by defendant that the maximum hourly charge for paralegal time in this community is $50.00 per hour. Because Mr. McCormick appears to be experienced in the field and competent at his work, and further because he had graduated from law school at the time the services were performed although he was not a member of the bar, $50 per hour for his work is reasonable.

Having found a reasonable rate of compensation, the Court returns to the question of the reasonable number of hours spent. Because the time records are not contemporaneous, the Court must examine with scrutiny the time claims for each specific task. The Court finds an excessive number of hours devoted to research, preparation, and other tasks

with respect to the arbitration hearing and request for trial de novo. Consequently, the number of hours claimed will be reduced three hours for Mr. Braswell and five hours for Mr. McCormick. The trial preparation time claimed in late May for both Braswell and McCormick, subject to special scrutiny because of the absence of contemporaneous records, appears in excess of that either reasonably or likely spent, and will be reduced by five hours for both. Finally, duplication of efforts appear at those entries dated March 14, 1988, April 28, 1988, June 1, and June 2, for which Mr. McCormick's hours will be reduced 15.8. At least partial duplication appears on May 28 through 31, for which Mr. McCormick's hours will be reduced 14.

Plaintiff claims entitlement to enhancement of these fees based on the

exceptional success and excellent result achieved. See Hensley v. Eckerhart,, 461 U.S. at 434. Although plaintiff obtained a recovery in the amount of $6,000, the $65,000 in back pay and punitive damages were not awarded. Thus, although plaintiff did achieve a success, it was not total nor exceptional. Counsel did not exhibit the extraordinary skill which would justify such a award. Ramos, 713 F.2d at 557. A bonus for social stigma should rarely be given, id. at 558, and no social stigma or undesirability, apart from the slim chance of success, has been shown. No bonus for the contingent nature of the fee is warranted in this case, id. at 558, expecially considering that counsel was paid a retainer in addition to the possibility of a count-awarded fee. In short, none of the factors listed in Ramos or Hensley

support plaintiff's request for an enhanced fee in this case. Plaintiff's contention that the constant threat of sanctions supports an enhanced fee is not supported by either controlling law or the facts of this case.

Finally, counsel seeks fees for the time spent in connection with the hearing on attorney's fees, to which he is entitled. The Court takes judicial notice that the hearing on fees lasted five hours, for which Mr. Braswell is entitled to be compensated at the rate of $100 per hour. No fee appears to be sought by Mr. McCormick, and in any event, such an award would constitute the duplication of effort found unwarranted above.

In accordance with the foregoing, it is ORDERED that plaintiff is entitled to a reasonable attorney's fee, determined

by the Court to be 77.5 hours of attorney time, to be compensated at $100 an hour and 142.1 hours of legal assistant time,to be compensated at $50.00 per hour. An additional five hours, at the rate of $100 per hour for the hearing on attorney's fees will be awarded, for a total sum of $15,355.00. As agreed at the hearing, counsel for plaintiff may withdraw the original time slips and substitute copies, within ten (10) days. As provided in Local Rule 39, any party aggrieved by this order may appeal within ten (10) days.

IT IS SO ORDERED this 4th day of October, 1988.

ROBIN J. CAUTHRON
UNITED STATES MAGISTRATE

Appendix G
Filed 9/27/88

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ERNEST E. RIGGS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV-87-2301R
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Scrivner, Inc., Defendant in the above-styled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final order of the United States District Court for the Western District of Oklahoma in this

action on the 1st day of September, 1988.

Peter T. Van Dyke
David M. Curtis
Randall W. Kamp

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405/235-7471

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 1991, three (3) correct copies of the foregoing APPENDIX was mailed, postage prepaid, to the following:

Peter Van T. Dyke
1200 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102
(405) 235-7471

Michael T. Braswell

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Ernest E. Riggs, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

This Petitioner's Appendix was mailed, first class, postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States, on August 7th, 1991, from the Main Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73102.

Michael T. Braswell
3621 N. Kelley, Suite 100
Oklahoma City, OK 73111
405/232-1950

STATE OF OKLAHOMA,)
) SS.
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 7th day of August, 1991.

Barbara Braswell
Notary Public

My Commission Expires 10-19-93.

CASE NO. 91-238

IN THE UNITED STATES SUPREME COURT

October Term 1991

Ernest E. Riggs, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel of record for Scrivner, Inc.

I. QUESTIONS PRESENTED

1. Whether the jury's decision on the petitioner's Section 1981 claim was a final judgment when there had not been a determination on petitioner's Title VII claims?

2. Whether the trial court's granting a new trial was in violation of the Federal Rules of Civil Procedure?

3. Whether the premature notice of appeal divested the District Court of jurisdiction?

II. PARTIES

Ernest E. Riggs
Plaintiff/Appellant/Petitioner

Scrivner, Inc.
Defendant/Appellee/Respondent
Parent - Haniel Corporation
Subsidiary (not wholly owned) -
Scrivner-Food Holdings, Inc.

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IV. OPINIONS BELOW

See Appendix to Petition for Writ of Certiorari

V. GROUNDS FOR JURISDICTION

(1) Opinion to be reviewed was entered on March 13, 1991, by the United States Court of Appeals for the Tenth Circuit and is published at 927 F.2d 1146 (10th Cir. 1991).

(2) On June 12, 1991, petitioner was granted an extension until June 26, 1991, to file his petition.

(3) Petitioner's brief was rejected two times upon presentation, and was finally accepted for filing on or about August 9, 1991.

(3) Jurisdiction is based upon 28 U.S.C. § 1254(1).

VI. STATUTES

Rule 54, Fed.R.Civ.P.

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A

judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 59, Fed.R.Civ.P.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United Stats. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to sere opposing affidavits, which period

may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 10, Rules of the Supreme Court of the United States

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are

special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States Court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but

> should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

VII. STATEMENT OF CASE

Petitioner brought this civil rights action alleging reverse discrimination in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000(e) on November 18, 1987, seeking back pay and actual and punitive damages. Following the trial on the merits, on June 2, 1987, the jury returned a verdict in favor of the petitioner on the § 1981 claim and the Court made an initial determination in favor of the respondent as to the Title VII claim. Thereafter, respondent filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial as to the

jury's determination on the § 1981 claim. The District Court denied respondent's motions on September 1, 1988. On September 1, the District Court also reversed its initial determination as to the Title VII claim, taking plaintiff's Title VII claim under advisement.

On September 27, 1988, a notice of appeal was filed challenging the District Court's September 1 determinations. No further appellate filings were made by respondent.

On December 7, 1988, respondent filed a motion for reconsideration of the Court's order overruling respondent's motion for judgment notwithstanding the verdict on the basis that the verdict was a result of jury

compromise. On January 18, 1989, the District Court, on its own initiative, entered an order notifying the parties that it would consider ordering a new trial in the case due to the fact that the verdict may have been the result of jury compromise. The parties were notified that the District Court would hear argument on the propriety of such an order.

On February 7, 1989, the District Court entered its order denying respondent's motion to reconsider and, sua sponte, ordered a new trial. The District Court thereafter entered an order nunc pro tunc amending the last paragraph of its sua sponte new trial order.

A new trial was held as to the § 1981 claim starting on July 12, 1989, and continuing through July 13, 1989. On July 13, 1989, the jury returned a verdict in favor of respondent and against petitioner. The District Court then entered judgment in favor of the respondent on the Title VII claim.

Petitioner appealed to the Tenth Circuit the District Court's August 2, 1989 ruling, all previous adverse rulings and the award of costs to the respondent. The Tenth Circuit affirmed the District Court's decision, dismissed the appeal as to sanctions and reduced the award of costs by $10.00. Petitioner does not seek certiorari as to all the issues presented to the Tenth Circuit.

VIII. SUMMARY OF ARGUMENT

A petition for writ of certiorari is to be granted only when there are special and important reasons to justify review. Petitioner has failed to state any special or important reasons and upon analysis, it is clear that none exist.

No final order had been entered in the case when the Court ordered the new trial, because the issue of Title VII relief had not yet been determined. Therefore, the Court was free under Rules 54 and 59, Fed.R.Civ.P., to order a new trial. The court's granting a new trial was proper and authorized under the Federal Rules of Civil Procedure.

Respondent's premature notice of appeal was ineffective and did not

divest the District Court of jurisdiction. The District Court was, therefore, free to issue the order for new trial.

IX. ARGUMENT

A. Petitioner has failed to show any special or important reason for this Court to exercise its discretion.

Rule 10, Rules of the Supreme Court of the United States of America, provides that review on writ of certiorari is not a matter of right, but of judicial discretion. A petition will be granted only where there exists special and important reasons for review. The rule recites examples to indicate the character of reasons that will be considered sufficient.

Petitioner, in his summation of argument, asserts that the District Court substantially departed from the accepted and usual course of proceedings and such conduct was improperly sanctioned by the Tenth Circuit.

The Supreme Court has explained:

> 'Special and important reasons' imply a reach to the problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

The sole basis of petitioner's arguments is that the jury verdict and

denial of the post trial motion rendered a final, appealable judgment. This argument hardly rises to being episodic. Petitioner does not buttress his theory with any facts or reasoning as to why the District Court's grant of a new trial was such an extreme departure from the usual course of judicial proceedings.

He has failed to show any special or important reason for the review and his petition should be denied.

B. There was no final order entered when the District Court ordered a new trial.

Petitioner argues, as he did to the Tenth Circuit, that when the District Court denied respondent's motion for judgment notwithstanding the verdict or, in the alternative, a new trial, the

court entered a final order which started the ten day clock running for purposes of granting a new trial under Rule 59, Fed.R.Civ.P. Petitioner admits that his claim under Title VII had not yet been determined by the court, but asserts that the § 1981 claim was final.

This argument was presented to the District Court and the Tenth Circuit, and both courts determined that there was no final order entered when the court ordered a new trial. To the extent that this issue is a question of fact, this court must afford this finding great weight. National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 98, 82 L.Ed.2d

70, 82, 104 S.Ct. 2948, 2959 fn. 15 (1984).

> "'A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' (citations omitted.) Unless there are one or more errors of law inhering in the judgment below, . . . we should affirm it."

Goodman v. Lukens Steel Co., 482 U.S. 656, 96 L.Ed.2d 572, 584, 107 S.Ct. 2617 (1987).

As the District Court and the Tenth Circuit court of appeals ruled, at the time the District Court granted a new trial, no final judgment had been entered in the case because petitioner's claims under Title VII were not yet

determined and no final judgment had been entered by the court or docketed.

A final judgment ends the litigation and leaves nothing for the court to do but execute the judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467, 57 L.Ed.2d 351, 357, 98 S.Ct. 2454 (1978). There is not a final and appealable judgment until all causes of action are disposed of by the trial court. Lamp v. Andrus, 657 F.2d 1167 (10th Cir. 1981); Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363 (10th Cir. 1977), as amended by Lewis v. B.F. Goodrich Company, 850 F.2d 641 (10th Cir. 1988). To be a final order, determination as to all claims must be made as to liability as well as damages. Liberty Mut. Ins. Co. v.

Wetzel, 424 U.S. 737, 47 L.Ed.2d 435, 96 S.Ct. 1202 (1976).

To be an effective judgment: (1) the judgment must be set forth in writing on a separate document under Rule 58, Fed.R.Civ.P., and (2) the judgment so set forth must be entered in the civil docket as provided in Rule 79(a), Fed.R.Civ.P. It is undisputed that no judgment was so entered in this case.

Pursuant to Rule 54(b), Fed.R.Civ.P., when more than one claim for relief is presented, the court may direct the entry of a final judgment as to one or more but fewer than all claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry

of judgment. In the absence of such a determination and when fewer than all the claims of the parties have been determined, the decisions of the court are subject to revision at any time before the entry of the final judgment. No certification was ever made by the District Court. In deed, the District Court determined that it had not entered any final judgment.

Although petitioner asserts that the § 1981 claim was separate and distinct from the Title VII claim for purposes of finality, he argues that because the first jury verdict under § 1981 was for petitioner, the Court must find liability under Title VII. Petitioner clearly cannot have it both ways.

Petitioner asserts that Oklahoma law provides for several successive final and appealable orders. However, this is not an accurate statement of Oklahoma law and the cases petitioner cites are inapposite. The final order from which an analogous state appeal is to be lodged disposes of all the issues in the controversy. Teel v. Public Service Co. of Oklahoma, 767 P.2d 391 (Okl. 1985). A judgment is the final determination of the rights of the parties in the action. Reems v. Tulsa Cable Television, Inc., 604 P.2d 373 (Okl. 1979). The disposal of a segment of a cause of action is not an appealable judgment. Teel, supra, at 395. However, Oklahoma procedural law is not applicable to the case at hand

which was brought under two federal statutes and adjudicated in federal court. Hanna v. Plummer, 380 U.S. 460, 14 L.Ed.2d 8, 85 S.Ct. 1136, (1965); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed.-1188, 58 S.Ct. 817 (1938).

Petitioner asserts that the parties have waived the separate documents requirement. This Court has made clear that the parties are free to waive the requirement. The parties did not do so in the case at hand.

In Bankers Trust Co. v. Samuel Mallis, 435 U.S. 381, 55 L.Ed.2d 357, 98 S.Ct. 1117, reh den. 436 U.S. 915, 56 L.Ed.2d 416, 98 S.Ct. 2259 (1978), this Court found a waiver where the District Court and the parties had assumed a final, appealable judgment was entered

and acted accordingly. The District Court and parties herein did the exact opposite.

This Court explained that the waiver theory is applicable to a situation where all other acts necessary for a final order were in place and a party appealed only to discover there had been no separate final judgment entered. Because the result of requiring a separate document would be dismissal of the appeal, followed by a subsequent appeal once the final judgment was entered, the Court would not make the "[w]heels...spin for no practical purpose." Id., at 385, 362.

Determining that a waiver occurred in the case at hand would not serve to expedite an appeal or avoid unnecessary

filings. Application of the waiver theory would require the undoing of the work of the District Court as affirmed by the Court of Appeals.

Additionally, waiver should not apply herein because the case was not otherwise ready for appeal. The Court had not yet ruled as to all causes of action so, pursuant to Rule 54, Fed.R.Civ.P., a final judgment could not be entered, absent special circumstances.

Notwithstanding the above, petitioner did not assert the argument of waiver to the District Court or the Tenth Circuit. Therefore, it is waived and not properly before this Court.

C. The District Court properly entered a sua sponte new trial order under Rule 59(d).

Under Rule 59, Fed.R.Civ.P., the ten day period to grant a new trial on a court's own initiative begins to run from the entry of a final judgment. As discussed above, unless an express determination is made by the court, the final judgment is entered on a separate document once all claims in the action are determined. The court has discretion to revise its interlocutory orders prior to entry of final judgment, which starts the ten day clock running. Anderson v. Deere & Co., 852 F.2d 1244 (10th Cir. 1988), Rule 54(b), Fed.R.Civ.P. All claims were not determined in the case at hand and no final judgment had been entered.

Clearly, the ten day clock had not yet begun to run.

D. A Premature Notice of Appeal does not divest the Court of Jurisdiction.

The timely filing of a notice of appeal does divest the District Court of jurisdiction. Garcia v. Burlington Northern R.R. Co., 818 F.2d 713, 721 (10th Cir. 1987). However, a premature notice filed before entry of a final judgment does not transfer jurisdiction to the Court of Appeals. Acosta v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251, 92 L.Ed.2d 192, 106 S.Ct. 2876 (1986); Art Janpol Volkswagen, Inc. v. Fiat Motors of N.Am., Inc., 767 F.2d 690, 697 (10th Cir. 1985). Because no final order had been entered, the notice of appeal filed

September 27, 1988, was ineffective and did not divest the Court of jurisdiction. Therefore, the entry of the new trial order was proper and the petition should be denied.

X. CONCLUSION

As the District Court and Tenth Circuit Court of Appeals determined, there was no final order entered in this case when the District Court ordered a new trial. Therefore, the new trial order was proper. Similarly, because there was no final and appealable order, the notice of appeal was ineffective and did not divest the court of jurisdiction or its ability to enter the new trial order.

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CERTIFICATE OF SERVICE

I hereby certify that I am counsel of record for the respondent and that on the 6 day of September, 1991, three (c) correct copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed, postage prepaid, to the following:

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